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No. 91-1076

In The

Supreme Court of the United States

October Term, 1991

LONG BEACH EQUITIES, INC.,

Petitioner,

v.

COUNTY OF VENTURA, CALIFORNIA, and CITY OF SIMI VALLEY, CALIFORNIA,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, LONG BEACH EQUITIES, INC.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, Long Beach Equities, Inc. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized PLF participation in this case.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

Amicus believes that the present case provides an excellent opportunity for this Court to provide some needed answers on the question of when land use regulation goes so far as to result in a taking. This case demonstrates particularly egregious conduct by local officials. And, in the future, such conduct can be assured in California if the views of the California Court of Appeal are allowed to stand. The opinion below not only seriously erodes the constitutional concept of property rights, but it

also drastically departs from the direction and reasoning employed by this Court in prior cases interpreting the Takings Clause.

STATEMENT OF THE CASE

This case involves a 180 degree turnabout in official actions regarding the residential development of a 250 acre parcel of property in Ventura County, California. Despite huge expenditures, including infrastructure costs incurred in reliance on official assurances, development of the property has been rendered economically infeasible by a series of regulatory actions undertaken by the local public agencies.

REASONS FOR GRANTING WRIT

Although this Court's willingness to now address takings issues in other factual settings is most welcome, there is continuing great need for this Court to consider the takings implications of zoning and other regulatory actions designed to alter residential development densities, or to downzone against residential development, in order to achieve land conservation or no-growth objectives. A major question presented is: How far can governmental officials go in depriving a property owner of values predicated on official assurances after these officials change their minds and decide that open space and growth control objectives should be emphasized?

For example, where, based on development assurances of officials, infrastructure is developed to support the construction of a large number of homes on a parcel of land, can government officials then decide that they want to preserve the property for open space and thereby change the zoning to reflect the latter use? Also—can government officials achieve this objective indirectly by a series of moratoria restrictions, or by the employment of other mechanisms, the practical effect of which is to make any development of the property economically infeasible? And if government cannot safely do these things, can it achieve the same result by downzoning actions which allow only some very limited use of the property—such as the development of one home on many acres of property?

This Court's views on such issues are urgently needed. The location of development needed to provide affordable housing stock, and the capital formation necessary thereto, may depend considerably on this Court's view. At present there is chaos. Both government officials and developers of housing stock are in the dark about what can be done. Takings law is interpreted differently in different jurisdictions and this only makes the real word problems of providing needed housing all the more difficult and uncertain.

The building industry in the State of California has to be gravely concerned with what it reads in the decision by the California Court of Appeal below. Those investing their time, moneys, and energies in the development of housing stock are now in effect being told that dealing with local officials is like swimming in a shark tank—

there are no constitutional protections and one had better be prepared to be eaten alive at any time.

The development of case law such as that below necessarily affects this nation's ability to provide needed affordable housing stock. And the uncertainties inherent in the present situation can only drive up the price of housing making it far less affordable for those who need it.

The present case provides this Court an excellent vehicle for addressing issues which cry out for some sensible resolution. This Court has never adopted a "shark tank" approach to its interpretation of the Takings Clause and it is in the public interest that this Court now speak to the issues.

SUMMARY OF ARGUMENT

While amicus agrees wholeheartedly with the petitioner's plea for this Court to clarify matters by further development of the law regarding regulatory takings, there is, at the same time, an equally great need for the Court to at least address the misuse of what it has already said. The opinion below well-illustrates such misuse.

The court below commenced its discussion of takings law with the following statement:

> "To state a cause of action for inverse condemnation, LBE *must* plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or

(2) such laws deprive it of substantially all economically viable use of its lands." Petition, Appendix C at 10 (emphasis added).

As will be shown, in so doing, the court below has taken two bright-line tests which always yield a takings result where the required showing is made and has converted them to a rule which says that a taking never results if government actions survive these tests.

In pursuing such an unwarranted approach, the court below overlooks the fact that this Court's interpretation of the Takings Clause has been based on much broader considerations. This Court has uniformly analyzed takings issues in light of the overall purpose of the Fifth Amendment's Takings Clause which "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The analysis by the court below is further exacerbated by that court's willingness to presume that government regulations are well-motivated and will serve their avowed purpose. By engaging in such deference to local regulatory actions, the court below not only side-steps the kind of examination required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3, but it reduces the takings issue to a question of whether the landowner has been deprived of substantially all economically viable use of his land. Thus the court below reasons that "it is constitutional to restrict the use of one's land" simply because "the public benefits greatly." Petition, Appendix C at 10. The court goes on to say that

in some cases, "no compensation may be required even if almost all uses are taken." *Id.*

With this basic approach to the problem, the court below was then quick to conclude that the takings issue was not ripe because it found, as a matter of law, that the regulatory devices employed did not necessarily result in any such land use devastation. This was done without permitting petitioner to factually establish that any further attempts to obtain approvals to put the property to some productive and economically feasible use would have been outright rejected and hopelessly futile. The mechanical approach taken by the court below has stretched this Court's ripeness requirement far beyond its intended purpose.

Lastly, although the court below recognized this Court's prior pronouncements regarding "frustration of reasonable investment-backed expectations" (*e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984); and *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978)), the court nevertheless stripped this federal takings issue of all vitality by concluding that property owners, in California, can never have a reasonable expectation of developing their property until they have satisfied California's harsh "vested rights" rule. As the court below pointed out, such a vested right does not accrue until one obtains a final building permit. Under this view, government officials can lead property owners down the garden path, all along assuring them that the passageway is perfectly safe, and can then abruptly push them over the brink of a cliff unless they have reached safety at the path's end.

As will be shown, California's vested rights rule has nothing whatever to do with this Court's pronouncements on the subject of reasonable investment-backed expectations.

ARGUMENT

I

THE COURT BELOW HOPELESSLY CONFUSED THIS COURT'S TAKINGS DOCTRINE

As this Court's prior decisions demonstrate, it is no answer to say that government pursues some legitimate interest. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. at 314-15 (Fifth Amendment is not designed to limit government interference but rather to secure compensation "in the event of otherwise proper interference"); *see also McDougal v. County of Imperial,* 942 F.2d 668, 676-77 (9th Cir. 1991) (legitimate public interest is not a trump card).

Usually government actions do pursue some legitimate government interest. But a question can still remain as to whether the legitimate pursuit of government goals nevertheless results in a taking requiring compensation. Under *Nollan,* a taking will assuredly occur if a regulation does not substantially advance legitimate government interests—but this does not mean that a taking will not occur if it does. There are still other factors to be considered under this Court's takings doctrine.

The purpose of the Takings Clause has always been to protect and secure the rights of the individual against

the government.[1] *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1872).

In 1922, this Court held that regulatory conduct can be challenged as a taking under the Takings Clause. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Court there explained:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

While the Court spoke of the Fifth Amendment's Takings Clause as a "seemingly absolute protection," the Court nevertheless recognized that it was qualified by "the police power." *Id.* Given this qualification, the Court also observed that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.*

This case demonstrates the accuracy of the Court's observation.

Although this Court has in more recent time referred to its *Pennsylvania Coal* regulatory takings analysis as "established doctrine" (*First Church*, 482 U.S. at 316), this Court has also recognized that the question of what constitutes a regulatory taking "has proved to be a problem of considerable difficulty." *Penn Central*, 438 U.S. at 123.

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[1] The Fifth Amendment applies to the state through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

What has always been clear, however, is that the takings issue is to be considered in light of the guiding principle that the Fifth Amendment's Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. at 48.

In *First Church*, this Court referred to this principle as "axiomatic." 482 U.S. at 318.

In *Penn Central*, the Court said that it had been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124.

The Court, in *Penn Central*, nevertheless "identified several factors that have particular significance." *Id.* The Court specifically pointed to:

1. "the character of the governmental action,"

2. the "economic impact of the regulation," and

3. "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.*

These factors have never been held to be exclusive. They are merely means for analyzing the question of whether, in a given factual situation, the regulation goes too far. In other words, such factors assist in determining whether the regulation is, in reality, an attempt to load

"upon one individual more than his just share of the burdens of government." *See Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissenting) (citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

As stated in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980):

> "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."

This Court's application of the *Penn Central* factors shows that if the force of any one is sufficiently strong, it alone will dispose of the takings question. *Monsanto*, 467 U.S. at 1005 (force of reasonable investment-backed expectation factor "so overwhelming" as to dispose of the taking question).

As a consequence of this Court's approach in resolving takings issues, two bright-line tests have evolved from the generalized considerations spelled out in *Penn Central* which weigh so heavily in favor of a takings conclusion that when either one occurs, it must be said that the regulation goes "too far" and that "fairness and justice" require the finding of a taking.

The first is where the character of the governmental action is such that it fails to substantially advance a legitimate government interest. *Nollan* illustrates this bright-line test and a taking was found despite the fact the property owners were left with reasonable use of their property. Indeed, the California court in *Nollan* had stressed this remaining use as a basis for its no taking

conclusion. This treatment of the case by the lower court was expressly acknowledged by this Court in its opinion.[2]

The second bright-line test recognizes a taking wherever the economic impact of the government regulation actually is so severe as to deny an owner economically viable use of the property. *Hodel v. Irving*, 481 U.S. 704, illustrates this test. There the regulation amounted "to virtually the abrogation of the right to pass on a certain type of property . . . to one's heirs." *Id.* at 716.

In *Agins*, this Court made it clear that either finding alone would result in a taking. The Court summarized the rule in the disjunctive as follows:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260.

Of course, it follows that even though government regulation may survive these bright-line tests, this does not end the inquiry. The character of the government action is still relevant. So also is the regulation's economic impact on the property. And, as noted above, this Court has given particular attention to interference with reasonable investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164; *Ruckelshaus v.*

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[2] "It [the California court] ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property." *Nollan*, 482 U.S. at 830.

Monsanto Company, 467 U.S. 986; and *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104.

Obviously, the lower court's analysis is confused and it is precisely this kind of confusion which should be addressed by this Court.

II

CALIFORNIA'S HARSH VESTED RIGHTS RULE CANNOT BE GRAFTED ON TO THIS COURT'S REASONABLE EXPECTATION RULE

Although the court below gives lip service to this Court's reasonable investment-backed expectation rule, it holds that this theory cannot be pursued unless the property owner has acquired a "vested right" to proceed with the final phase of construction under California law. The court below has thus grafted on to this Court's analysis an additional requirement that the vesting rules adopted by the California Supreme Court in *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785 (1976), be first satisfied. But, as the court below recognized, that case not only requires substantial expenditures but also requires that one obtain a final building permit.

California's vested rights doctrine is grounded on the principle of equitable estoppel, *not* on the Fifth Amendment's Takings Clause. To say that one cannot have a reasonable investment-backed expectation until the California doctrine is met is the equivalent of throwing out the federal rule in its entirety. Frustration of expectations becomes moot when one has a permit in hand. This Court

has never hinted that its rule is limited to the kind of proofs required by the court below. Indeed, as this Court pointed out in *Kaiser Aetna*, although the actions of individual officials representing a governmental agency may not "estop" the government from pursuing its action, such conduct "can lead to the fruition of a number of expectancies embodied in the concept of 'property.' " *Id.* at 179.

III

THE OPINION BELOW REFLECTS THE NATIONAL CONFUSION OVER THIS COURT'S RIPENESS REQUIREMENTS

This amicus strongly endorses petitioner's views regarding the need to address the hopeless confusion that has resulted from this Court's ripeness requirements and, in particular, its decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986).

What was intended as a rule of practical application, designed to ensure that a claim is not premature, has resulted in a bureaucratic nightmare involving tactics regularly employed to "defense" all takings claims as not ripe. As a consequence, regulatory victims are being deprived of any effective judicial remedy. The opinion below well illustrates the problem and affords this Court an excellent opportunity to address it.

The court below relied heavily on this Court's statement in *MacDonald, Sommer*:

> "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." 477 U.S. at 348.

The court below reasoned:

> "Denial of approvals for a particular and relatively intensive residential development, as here, cannot be equated with a refusal to permit any beneficial use whatsoever." Petition, Appendix C at 17.

But here, the case pleaded is that final decisions have been made. Although opportunity may always exist to file further applications, where the facts alleged show an absolute unwillingness to consider such applications, and where it is known that they will not be processed, finality is achieved.

It is submitted that this Court never intended its ripeness requirements, designed to protect against premature claims, to be used as a device for requiring futile actions.

But even if it were otherwise, this Court's ripeness rules still cannot be extended to the present type of case for yet other reasons. The rule cannot logically be applied in any case:

1. where takings factors other than impact on use are involved (such as failure to substantially advance legitimate government interests or frustration of reasonable investment-backed expectations) and the property owner seeks to show that these factors are sufficient to prove a takings claim regardless of remaining uses, or

2. where the property owner seeks to show that no lesser use, even if approved, would be economically feasible.

In the first situation, a taking can result despite remaining economic uses. And where the required proof is made, knowing the degree of economic impairment is unnecessary. For example, where a plaintiff can sufficiently demonstrate interference with reasonable investment-backed expectations, a taking will be shown. And this result will follow even absent, as stated by the court below, "a refusal to permit any beneficial use whatsoever." The reasonable expectation rule would be rendered sheer surplusage if in every case a property owner had to show denial of all economically viable use. As noted, this Court in *Monsanto*, 467 U.S. 986, found the reasonable expectation factor to be "overwhelming" (*id.* at 1005) and remaining usefulness to Monsanto "irrelevant" (*id.* at 1012).

Likewise, deprivation of use is not an essential ingredient where, as here, it is claimed that regulatory action fails to substantially advance a legitimate government interest. Such proof, by itself, can support a taking conclusion regardless of economic impact. *Nollan*, 483 U.S. 825, is a good example. As *Nollan* demonstrates--one need not know what beneficial uses remain where it is not necessary to know what beneficial uses remain in order to find a taking.

In the second situation set forth above, it is only reasonable to allow a property owner to show that, even if applications for lesser uses could be pursued, and even

if such uses might be allowed, such uses would be economically infeasible. Surely, this Court, in its earlier ripeness cases, did not intend to impose a requirement that applications be processed for uses which cannot economically be pursued.

In short, ripeness requirements should not be mechanically imposed in situations where they serve no purpose. They are inappropriate in any case where a property owner is seeking to pursue factually a claim that his constitutional rights have been invaded regardless of whether other uses might be allowed. Accordingly, the *MacDonald, Sommer* finality ripeness requirement should be limited to cases where a property owner's claim is dependent on proving deprivation of use and it is necessary to know whether other uses may be allowed in order to decide the case.

It also follows that where, as here, one seeks to show factually that regulatory action does not substantially advance legitimate public interests, or that reasonable investment-backed expectations have been frustrated, such matters cannot be resolved as a matter of law. Even in a due process setting, the question of whether regulatory actions legitimately pursue governmental goals can involve factual questions which require a fact-finding type judicial inquiry. *See, e.g., Nectow v. City of Cambridge,* 277 U.S. 185 (1928).

CONCLUSION

For the reasons stated above, amicus respectfully requests that this Court grant the petition for certiorari.

DATED: January, 1992.

Respectfully submitted,

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